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FEDERAL ELECTION COMMISSION
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Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

CELA

MUR 6358

DATE COMPLAINT FILED: Aug. 26, 2010

DATE OF NOTIFICATION: Sept. 2, 2010

DATE OF LAST RESPONSE: Oct. 18, 2010

DATE ACTIVATED: Feb. 15, 2011

EXPIRATION OF SOL: Aug. 18, 2015 to
Aug. 24, 2015

COMPLAINANT:

Dwight Pelz, Chair, Washington State Democratic Party

RESPONDENTS:

Representative Jaime Herrera Beutler (f/k/a Jaime
Herrera)

Jaime for Congress (f/k/a Jaime Herrera for Congress)
and Keith Bundy, in his official capacity
as treasurer
Americans for Prosperity

**RELEVANT STATUTES
AND REGULATIONS:**

2 U.S.C. § 431(4)
2 U.S.C. § 433
2 U.S.C. § 434
2 U.S.C. § 441a(a), (f)
2 U.S.C. § 441a(a)(7)(B)
2 U.S.C. § 441b
11 C.F.R. § 109.21

INTERNAL REPORTS CHECKED:

Disclosure reports; Commission indices

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

The complaint in this matter alleges that Americans for Prosperity ("AFP") coordinated
an August 2010 television advertisement with Representative Jaime Herrera Beutler (f/k/a Jaime
Herrera) and her principal campaign committee, Jaime for Congress (f/k/a Jaime Herrera for

1 Congress) and Keith Bundy, in his official capacity as treasurer ("the Committee").¹ The
2 complaint alleges that individuals closely associated with Herrera Beutler and her campaign
3 appeared in the advertisement, thus satisfying the conduct prong of the Commission's
4 coordination regulations. The complaint asserts that AFP's payment for the advertisement,
5 which criticized Herrera Beutler's opponent, Denny Heck, constituted an in-kind contribution in
6 excess of \$1,000, and, therefore, AFP was required to register and report to the Commission as a
7 political committee. In response, the Respondents argue there was no coordination because there
8 are no facts that satisfy the conduct standard of the Commission's regulations. AFP further
9 responds that, since there was no coordination, there was no contribution or expenditure in
10 excess of \$1,000 for the purpose of influencing a federal election; in addition, AFP argues that it
11 is not operated for the purpose of influencing federal elections.

12 Upon review of the complaint, responses, and other available information, there appears
13 to be no basis for concluding that AFP coordinated with Herrera Beutler or her campaign
14 regarding the advertisement at issue, or that AFP was required to register and report as a political
15 committee. Therefore, we recommend that the Commission find no reason to believe that AFP
16 violated 2 U.S.C. §§ 433, 434, 441a, or 441b; that Jaime Herrera Beutler violated 2 U.S.C.
17 §§ 441b or 441a(f); or that the Committee violated 2 U.S.C. §§ 441b, 441a(f), or 434(b); and
18 close the file.

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¹ After the complaint and responses were filed in this matter, Jaime Herrera for Congress changed its name to Jaime for Congress, filing a Statement of Organization to that effect on December 20, 2010. Around the same time, the candidate, who is now a member of Congress representing Washington's 3rd Congressional District, appears to have changed her name from Jaime Herrera to Jaime Herrera Beutler. See <http://herrerabeutler.house.gov/>; Kyung M. Song, *Jaime Herrera takes husband's name, belatedly*, THE SEATTLE TIMES, Dec. 22, 2010.

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1 **II. FACTUAL AND LEGAL ANALYSIS**

2 **A. Factual Background**

3 AFP is organized under section 501(c)(4) of the Internal Revenue Code; it registered as a
4 non-profit corporation in the District of Columbia in 2004, but is not registered with the
5 Commission as a political committee. <http://americansforprosperity.org/about/legal>;
6 <http://mblr.dc.gov/cerp/lookup/status.asp?id=37265>. AFP states that it is "committed to
7 educating citizens about economic policy and mobilizing those citizens as advocates in the
8 public policy process." <http://americansforprosperity.org/about>. AFP maintains that it has
9 1.6 million activists in all 50 states, including 31 state chapters. *Id.* In 2008, AFP reported
10 receipts of \$7,012,051 in its tax returns filed with the Internal Revenue Service. AFP also
11 reported expenses for communications, advertisements, and media totaling \$3,063,611, which
12 comprised 43 percent of its total expenses that year. AFP filed seventeen electioneering
13 communications reports with the Commission during the 2010 election cycle that disclosed
14 \$1,311,800.11 in disbursements for production and placement of television and radio spots.

15 Jaime Herrera Beutler was a candidate in the 2010 general election for Washington's
16 3rd Congressional District, and Jaime for Congress is her principal campaign committee. Her main
17 opponent in the election was Denny Heck. The television advertisement at issue was reportedly
18 broadcast in the congressional district from approximately August 18 to 24, 2010, and reportedly
19 cost AFP \$180,390. See Kathy Durbin, *Conservatives launch TV ad attacking 3rd District*
20 *Democratic candidate Heck*, THE (Vancouver, WA) COLUMBIAN, Aug. 20, 2010; see also
21 <http://www.americansforprosperity.org/081910-tell-denny-heck-we-need-new-leadership>. The
22 advertisement was 30 seconds long and contained the following content:

<u>VISUAL</u>	<u>AUDIO</u>
Keath Huff speaking; bottom caption reads "Keath Huff, Kelso, WA."	Keath Huff: "Our part of Washington state faces devastating unemployment."
Melody Thum speaking; bottom caption reads "Melody Thum, Vancouver, WA." Middle caption states "Denny Heck: Putting Pelosi's Agenda Ahead of Our Needs."	Melody Thum: "But Denny Heck is putting Nancy Pelosi's agenda ahead of our needs."
Ryan Hart speaking; bottom caption reads "Ryan Hart, Vancouver, WA." Middle caption states "Denny Heck: Supported \$787 Billion Failed Stimulus."	Ryan Hart: "Heck supported the liberal \$787 billion dollar stimulus ... [continued by next speaker]"
Aaron Christopherson speaking; bottom caption reads "Aaron Christopherson, Woodland, WA."	Aaron Christopherson: "... that failed to save and create jobs."
Keath Huff speaking; middle caption reads "Denny Heck: Refused to Oppose New Energy Taxes."	Keath Huff: "And Heck refused to oppose new energy taxes... [continued by next speaker]"
Christian Tyler speaking; bottom caption reads "Christian Tyler, Battle Ground, WA."	Christian Tyler: "... that will kill even more jobs here."
Karen Wagner speaking; bottom caption reads: "Karen Wagner, Vancouver, WA." Middle caption states "Denny Heck: 30-year Political Insider."	Karen Wagner: "Denny Heck is a 30-year political insider and a career politician."
Cynthia Langston speaking; bottom caption reads: "Cynthia Langston, Vancouver, WA."	Cynthia Langston: "Heck's agenda will hurt Washington state."
Ryan Hart speaking; bottom caption reads "Paid For By Americans For Prosperity."	Ryan Hart: "Tell Denny Heck Washington state needs leadership ... [continues into next visual]"
Image of Denny Heck with Nancy Pelosi in background; caption reads "Tell Denny Heck: We Need Leadership, Not Nancy Pelosi's Failed Policies (360) 878-9144 Sign the Petition at: November is Coming.com Paid For By Americans For Prosperity."	Ryan Hart: "... not more of Nancy Pelosi's failed policies."

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2 The complaint alleges that the ad "features several individuals believed to be closely
3 associated with [Herrera Beutler] and her campaign," including Aaron Christopherson, Keath Huff,
4 and Ryan Hart. Complaint at 2. The complaint states that Christopherson, Huff, and Hart are each
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1 identified on Herrera Beutler's campaign website as endorsing her 2010 candidacy.² The complaint
2 states that Christopherson served as Herrera Beutler's campaign manager when she ran for re-
3 election to the Washington state legislature in 2008. The complaint further states that Huff and Hart
4 "are also members of several Republican organizations with close ties to [Herrera Beutler's]
5 campaign." Complaint at 2. The complaint references a website identifying Huff as a "member of,"
6 *inter alia*, the Republican National Committee, the Cowlitz County Republican Central Committee,
7 and the Cowlitz County Young Republicans," see [http://vote-](http://vote-wa.org/Intra.aspx?State=WA&Id=WAHuffKeath)
8 [wa.org/Intra.aspx?State=WA&Id=WAHuffKeath](http://vote-wa.org/Intra.aspx?State=WA&Id=WAHuffKeath), and another website listing Hart as a State
9 Committeeman for the Clark County (Washington) Republican Party. See
10 <http://clarkcountygop.org/content.htm?cid=28>. The complaint further states that Huff has "recently
11 identified himself as a 'friend' and 'supporter' of" Herrera Beutler, Complaint at 2, citing a website
12 in which Huff appears to have posted a letter containing phrases such as "my friend Jaime Herrera."
13 See <http://libertyteeth.com/?tag=tea-party>.

14 The complaint contends that it is "implausible" that Herrera Beutler's "friends, former
15 employees, party supporters, surrogates, and endorsers would have all agreed to appear in the AFP
16 advertisement without the assent, substantial discussion or material involvement of" Herrera Beutler
17 or her campaign. Complaint at 3. The complaint concludes that, assuming there was coordination,
18 AFP made and, Herrera Beutler and the Committee accepted, an illegal unreported in-kind
19 contribution. The complaint alleges that the coordination resulted in AFP making an expenditure
20 exceeding \$1,000, requiring it to register as a political committee with the Commission.

² The web page referenced in the complaint is no longer available; however, an archived web page from October 2010 contains a list of "Individuals" who endorsed Herrera Beutler, including "Ryan & Diane Hart, Vancouver residents," and "Keath Huff, Longview resident." See <http://replay.web.archive.org/20101028215212/http://www.jaimeherrera.com/endorsements.html>.

1 In its response, AFP states that "[n]ot only was there no coordination (and hence, no 'in-kind
2 contribution' to the . . . campaign), Americans for Prosperity was not formed and is not operated for
3 the purpose of influencing federal elections and any contributions received by the group have not
4 been for that purpose." AFP Response at 4. AFP contends that the complaint "provides no evidence
5 or information suggesting that AFP or the candidate engaged in any of the conduct described in the
6 conduct standards in 11 C.F.R. § 109.21(d)." *Id.* at 3. AFP states that none of the three individuals
7 identified in the complaint are or were agents of the candidate, noting that two years have passed
8 since Aaron Christopherson managed Herrera Beutler's campaign for non-federal office. According
9 to the complaint, Christopherson's previous association with Herrera Beutler, as well as the ties of
10 the other two individuals to Republican organizations, have no legal significance, as there is no
11 evidence of any coordination by or through any of these individuals. AFP further states that an
12 "internal review" of this matter found "no evidence" of "assent, substantial discussion or material
13 involvement." *Id.*

14 AFP provided several documents in support of its response, including information about
15 internal firewall policies that it set up to "prevent the sharing or discussion of AFP's plans and
16 activities with any federal candidate or political party committee." AFP Response at 3. AFP claims
17 that its firewall policies complied with Commission rules "and were acknowledged and understood
18 by all of the personnel involved in the production of this advertisement." *Id.* AFP provided a copy
19 of a firewall policy signed by the president of the media vendor that produced the ad; the document
20 states, *inter alia*, that the vendor "is prohibited from discussing AFP's issue advocacy
21 communications with a candidate or campaign or political party committee, or the agents of these
22 groups." Att. A of AFP Response. AFP's internal policy, Att. B of AFP Response, states that "AFP
23 directors, officers, and employees are prohibited from discussing AFP's issue advocacy program

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1 with any . . . candidate . . . or candidate's staff and agents. Similarly, no AFP director, officer, or
2 employee may have a discussion with a federal candidate [or agent] about the federal candidate's . . .
3 plans, projects, activities, or needs."

4 AFP submitted affidavits from Kirby Wilbur and Kathy McDonald, the two AFP staffers it
5 maintains were involved in the production of the advertisement. Wilbur states that he was asked by
6 AFP's media vendor to contact local residents to appear in the ad, and McDonald states that she was
7 contacted by Wilbur. Atts. C & D of AFP Response. McDonald states that she contacted
8 Christopheron and was aware he had managed Herrera Beutler's 2008 non-federal campaign, "but
9 to the best of my knowledge he was not involved" in her current campaign. *Id.* The affidavits of
10 Wilbur and McDonald similarly state that other individuals they contacted – including Keath Huff
11 and Ryan Hart – were not, to the best of their knowledge, involved in any congressional campaigns
12 in the district. *Id.* AFP also submitted an affidavit from the vendor employee who was tasked to
13 create the advertisement; he states that he was aware of, and abided by, AFP's firewall policy. Att.
14 E of AFP Response.

15 The Committee's response asserts that the conduct standard is not satisfied because, *inter*
16 *alia*, Christopheron "has been neither an employee nor an independent contractor of [Herrera
17 Beutler] in the last 120 days, or at any time in connection with her federal campaign." Committee
18 Response at 2. In addition, with one exception, no campaign vendors have performed the services
19 described in the Commission's common vendor regulation. *Id.* The lone common vendor (who was
20 not the same vendor who produced the ad at issue) provided services to AFP under the terms of
21 AFP's firewall policy and in accordance with that vendor's own firewall policy. *Id.* at 2-3. The
22 Committee submitted a sworn declaration from Herrera Beutler's 2010 campaign manager (and also
23 treasurer around the time the AFP ad was run), Casey Bowman, who states that he was responsible

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1 for the Committee's public communications and overall campaign strategy. Att. 1 of Complaint.
2 Bowman asserts that none of the individuals identified in the complaint had any role in campaign
3 operations, plans, communications, or strategy, and that he had no such discussions with them. *Id.*
4 He acknowledges that they are listed as endorsers on the campaign's web page, but claims that the
5 candidate and her campaign did not request or suggest that AFP produce the ad or that AFP contact
6 anyone who had endorsed her. *Id.* Bowman also states that the candidate and her campaign were
7 not involved in any decisions by AFP concerning the ad, and that, based on his own inquiry, the
8 candidate and the campaign have not had any communications with anyone identifying themselves
9 as a representative or agent of AFP. *Id.*

10 B. Legal Analysis

11 The central issue in this matter is whether the television advertisement paid for by the AFP
12 was coordinated with Herrera Beutler or her campaign. The Federal Election Campaign Act of
13 1971, as amended ("the Act"), prohibits any corporation from making a contribution to a political
14 committee and similarly prohibits candidates and political committees from accepting or receiving
15 such contributions. 2 U.S.C. § 441b(a). The Act provides that an expenditure made by any person
16 "in cooperation, consultation, or concert, with, or at the request or suggestion of," a candidate or his
17 authorized committee or agent is a contribution to the candidate. See 2 U.S.C. § 441a(a)(7)(B)(i);
18 11 C.F.R. § 109.20(a). Treasurers of political committees are required to disclose all contributions,
19 including in-kind contributions. 2 U.S.C. § 434(b).

20 1. Coordination

21 A communication is coordinated with a candidate, an authorized committee, a political
22 party committee, or an agent of any of the foregoing when the communication is (1) paid for, in
23 whole or part by a person other than that candidate, authorized committee, or political party
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committee; (2) satisfies at least one of the content standards³ described in 11 C.F.R. § 109.21(c); and (3) satisfies at least one of the conduct standards described in 11 C.F.R. § 109.21(d). 11 C.F.R. § 109.21(a)(1)–(3).

In this matter, the first prong of the coordinated communication test is satisfied because AFP is a third-party payor. See 11 C.F.R. § 109.21(a)(1). The second prong of this test, the content standard, appears to be satisfied because the advertisement at issue is a public communication that refers to a clearly identified candidate for federal office (Denny Heck), and was broadcast “in the clearly identified candidate’s jurisdiction” within 90 days of the November 2, 2010 general election. 11 C.F.R. § 109.21(c)(4)(i). A “public communication,” is defined as “a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general political advertising.” 11 C.F.R. § 100.26. AFP’s response states that it does not dispute that it paid for the advertisement and that the communication thus satisfies the payment prong; the response further states that AFP does not dispute that the communication satisfies a content standard in 11 C.F.R. § 109.21(c).

However, the conduct prong is not satisfied in this matter. The conduct prong is satisfied where any of the following types of conduct occurs: (1) the communication was created, produced, or distributed at the request or suggestion of a candidate or his campaign; (2) the candidate or his campaign was materially involved in decisions regarding the communication; (3) the communication was created, produced, or distributed after substantial discussions with

³ The Commission recently revised the content standard in 11 C.F.R. § 109.21(c) in response to the D.C. Circuit’s decision in *Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008). The Commission added a new standard to the content prong of the coordinated communications rule. 11 C.F.R. § 109.21(c)(5) covers communications that are the functional equivalent of express advocacy. See *Explanation and Justification for Coordinated Communications*, 75 Fed. Reg. 55947 (September 15, 2010). The effective date of the new content standard is December 1, 2010, after the events at issue in this matter. The new standard would not change the analysis in this Report.

1 the campaign or its agents; (4) the parties contracted with or employed a common vendor that
2 used or conveyed material information about the campaign's plans, projects, activities or needs,
3 or used material information gained from past work with the candidate to create, produce, or
4 distribute the communication; (5) the payor employed a former employee or independent
5 contractor of the candidate who used or conveyed material information about the campaign's
6 plans, projects, activities or needs, or used material information gained from past work with the
7 candidate to create, produce, or distribute the communication; or (6) the payor republished
8 campaign material. See 11 C.F.R. § 109.21(d).

9 The complaint contains no specific information indicating that any of the conduct
10 standards were satisfied in this matter, and we are not aware of any available information that
11 supports such a conclusion. Instead, the complaint merely argues that it is "implausible" that
12 Herrera Beutler's friends, supporters, and former employees, some of whom were identified on
13 an extensive endorsement list on the campaign website, would have agreed to appear in the AFP
14 advertisement without the involvement of the Committee or its agents. However, there is no
15 information indicating that the Committee or its agents requested or suggested that AFP create
16 the ad, participated in any discussion about the ad on behalf of the Committee, were materially
17 involved in its creation or dissemination as Committee agents, or otherwise informed AFP about
18 the campaign's plans, projects, activities, or needs. Even assuming that Aaron Christopherson
19 was formerly employed by Herrera Beutler, this activity occurred far more than 120 days prior to
20 the airing of the ad, and there is no information suggesting that Christopherson was ever
21 employed by AFP's media vendor. See 11 C.F.R. § 109.21(d)(5)(i). There is also no basis on
22 which to conclude that the ad constituted republication of campaign material, as the available
23 information does not indicate that the content had been used in any Committee communications.

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Moreover, the Respondents have provided sworn affidavits from key individuals specifically rebutting any implication that the advertisement was created at the request or suggestion of, with the material involvement of, or after substantial discussions with, the candidate or his agents, thereby negating the existence of conduct at 11 C.F.R. § 109.21(d)(1)-(3). In addition, AFP has provided documentation of a firewall policy that existed at the time of the communication and appears to satisfy the safe harbor criteria at 11 C.F.R. § 109.21(h); i.e., the policy appears to have been designed and implemented to prohibit the flow of information between its employees and consultants and those of federal candidates, and it was distributed to relevant employees and consultants. Indeed, the AFP employees most closely involved in the production of the ad had each signed the policy document several months prior to the broadcast of the ad (copies of which are appended to AFP's response).

Given the Respondents' specific denials, the speculative nature of the complaint, and the absence of any other information suggesting coordination, the conduct prong of the coordinated communications regulations has not been met. Thus, there appears to be no resulting violation of the Act. Therefore, we recommend that the Commission find no reason to believe that Americans for Prosperity; Jaime for Congress (f/k/a Jaime Herrera for Congress) and Keith Bundy, in his official capacity as treasurer; or Representative Jaime Herrera Beutler (f/k/a Jaime Herrera), violated 2 U.S.C. § 441b.

2. AFP's Political Committee Status

Complainant's allegation that AFP was required to register with the Commission as a political committee, and failed to abide by applicable contribution limits, is based on the assertion that the advertisement constituted a contribution or expenditure in excess of \$1,000 that satisfied the threshold requirement for political committee status. See 2 U.S.C. § 431(4)(A).

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1 The Act defines a "political committee" as any committee, club, association, or other group
2 of persons that receives "contributions" or makes "expenditures" for the purpose of influencing a
3 federal election which aggregate in excess of \$1,000 during a calendar year. *Id.* An organization
4 will not be considered a "political committee" unless its major purpose is "Federal campaign activity
5 (*i.e.*, the nomination or election of a Federal candidate)." Political Committee Status: Supplemental
6 Explanation and Justification, 72 Fed. Reg. 5595, 5597 (Feb. 7, 2007). *See Buckley v. Valeo*, 424
7 U.S. 1, 79 (1976); *FEC v. Massachusetts Citizens for Life, Inc. (MCFL)*, 479 U.S. 238, 262 (1986).
8 Political committees must register with the Commission and abide by the Act's reporting provisions
9 and contribution limitations. 2 U.S.C. §§ 433, 434, 441a.

10 Given that the advertisement at issue does not appear to have been coordinated, and thus did
11 not constitute an in-kind contribution to the Committee, AFP did not satisfy the threshold
12 requirement for political committee status by making a "contribution" or "expenditure" in excess of
13 \$1,000. *See* 2 U.S.C. § 431(4)(A). Therefore, we recommend that the Commission find no reason to
14 believe that Americans for Prosperity violated 2 U.S.C. §§ 433, 434, or 441a. Further, in the
15 absence of coordination, the Committee and Herrera Beutler did not accept or fail to report a
16 contribution from AFP. Accordingly, we recommend that the Commission find no reason to believe
17 that Jaime for Congress (*f/k/a* Jaime Herrera for Congress) and Keith Bundy, in his official capacity
18 as treasurer, or Representative Jaime Herrera Beutler (*f/k/a* Jaime Herrera), violated 2 U.S.C.
19 §§ 441a(f) or 434(b); or that Representative Jaime Herrera Beutler (*f/k/a* Jaime Herrera) violated
20 2 U.S.C. §§ 441a(f).

III. RECOMMENDATIONS

1. Find no reason to believe that Americans for Prosperity violated 2 U.S.C. §§ 433, 434, 441a, or 441b.
2. Find no reason to believe that Jaime for Congress (f/k/a Jaime Herrera for Congress) and Keith Bundy, in his official capacity as treasurer, violated 2 U.S.C. §§ 441b, 441a(f), or 434(b).
3. Find no reason to believe that Representative Jaime Herrera Beutler (f/k/a Jaime Herrera) violated 2 U.S.C. §§ 441b or 441a(f).
4. Approve the attached Factual and Legal Analyses.
5. Approve the appropriate letters.
6. Close the file.

Christopher Hughey
Acting General Counsel

Kathleen Guith
Acting Associate General Counsel

June 16, 2011
Date

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